Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44-66 OF 2003
ABDUL KADIR MUSA J
17 MAY 2004

Constitutional Law — Fundamental liberties — Habeas Corpus — Application for — Detention grounds referred to applicants as members of Jemaah Islamiah — Art 11(1) of Federal Constitution guarantees freedom of religion — Whether detention ground inconsistent with Art 11 — Federal Constitution Arts 11 & 149 — Internal Security Act 1960 s 8(1)

Constitutional Law — Preventive Detention — Grounds of arrest — Detention under Internal Security Act 1960 — Detention order under s 8(1) of the Internal Security Act 1960 — Detention grounds referred to applicants as members of Jemaah Islamiah — Art 11(1) of Federal Constitution guarantees freedom of religion — Whether applicants acted or are likely to act in any manner prejudicial to the security of Malaysia or any part thereof — Internal Security Act 1960 s 8(1)

The applicants filed this application for an order, inter alia, that the arrest and detention of each one of them under the Internal Security Act 1960 was unlawful, illegal and a nullity; and for an issuance of the writ of habeas corpus for each one of them for their immediate release on the grounds that: (1) their arrest and detention were allegedly done *mala fide;* (2) their arrest and detention were against the freedom to practice Islam under Art 11 of the Federal Constitution; and (3) there is no establishment known as Jemaah Islamiah and that the applicants are members of the lawfully registerered 'Pertubuhan Al-Ehsan'.

Held, dismissing the application:

(1) The facts of this application are not of the 'freedom of religion' as of fact, but of activities which the Minister rightly concluded were 'prejudicial to the security' of the country and must be 'prevented' as required under s 8(1) of the Internal Security Act 1960 (see para 37).

(2) The Minister did not just mechanically issue the detention order without considering relevant facts and material particulars pertaining to the security of Malaysia or any part thereof. The purpose of such issuance is 'for the purpose of preventing the Applicants from [continuing] acting in any manner prejudicial to the security of Malaysia or any part thereof in line with the spirit of section 8(1) of the ISA' (see para 44).

[**Bahasa Malaysia summary**

Pemohon–pemohon memfailkan permohonan ini untuk antara lain satu perintah bahawa penangkapan dan tahanan mereka di bawah Akta Keselamatan Dalam Negeri 1960 adalah tidak mengikut undang-undang,

tidak sah dan terbatal; dan untuk mendapatkan writ habeas corpus untuk setiap seorang mereka untuk mereka dibebaskan serta-merta atas alasan: (1) tangkapan dan tahanan mereka kononnya dilakukan dengan niat jahat; (2) tangkapan dan tahanan mereka bertentangan dengan kebebasan untuk mengamalkan agama Islam di bawah Artikel 11 Perlembagaan Persekutuan; (3) tidak ada pertubuhan yang dikenali sebagai Jemaah Islamiah dan pemohon-pemohon adalah ahli pertubuhan yang didaftarkan mengikut undang-undang iaitu 'Pertubuhan Al-Ehsan'.

Diputuskan, menolak permohonan tersebut:

(1) Fakta permohonan ini bukanlah mengenai 'kebebasan beragama', tetapi mengenai tindakan menteri yang dengan betul membuat kesimpulan bahawa 'prejudis kepada keselamatan' negara dan harus dihalang seperti yang diperlukan di bawah s 8(1) Akta Keselamatan Dalam Negeri 1960 (lihat perenggan 37).

(2) Menteri tersebut tidak secara mekanikal mengeluarkan perintah tahanan tanpa mengira fakta yang relevan dengan butir-butir yang material mengenai keselamatan Malaysia atau sebahagianya. Tujuan pengeluaran perintah tersebut adalah untuk mengelak pemohon-pemohon dari [terus]bertindak dengan apa juga cara yang prejudis kepada keselamatan Malaysia atau sebahagianya sejajar dengar jiwa s 8(1) Akta Keselamatan Dalam Negeri (lihat perenggan 44).

Notes

For cases on habeas corpus, see 3(2) *Mallal's Digest (*4th Ed, 2003 Reissue) paras 1820–1826

For cases on prevention of detention, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1985

Cases referred to

Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1989] 1 MLJ 368 (refd)

Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals [2002] 4 MLJ 449 (refd)

Yap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors [1975] 2 MLJ 279

Legislation referred to

Delegation of Powers Act 1956 s 6

Federal Constitution arts 5, 9, 10, 11, 13, 149(1), 151(2)

Internal Security Act 1960 ss 5(3), 8(1), 8B(1), 11(1), (2)(b)(i) and (ii), 73(1)

Edmund Don (Edward Saw, Amir Hamzah and Abdul Rashid with him) (Chooi &Co) for the applicants

Ishak Yusof DPP (Mohd Hanafiah with him) for the respondents

Abdul Kadir Musa J:

[1] By Enclosure (2), the eight applicants filed an originating motion:

(1) for all the applicants to be produced in Court during the proceedings of their application for the issuance of a writ of Habeas Corpus;

(2) that the arrest of each one of them was unlawful, illegal and a nullity;

(3) for the issuance of a writ of Habeas Corpus for each one of them and their immediate release;

(4) that all parties are at liberty to apply; and

(5) for any other relief(s) the Court deems fit and proper.

[2] The said motion was supported by the respective applicant's affidavits numbered as Encl (3)–(10) respectively.

[3] Paragraph (1) of each of the aforesaid affidavits identifies each of the Applicants. In all the paragraphs (2) of the same, all the three Respondents were identified. Paragraph (3) of each said affidavit speaks of the facts and incidentals thereto known or within the knowledge of each Applicant. Paragraph (4) reaffirmed their assertion for the writ of habeas corpus as stated in paragraph (3) of Encl (2) aforesaid. The rest of each aforesaid affidavit can be placed as follows:

(a) Averments in respect of the *arrest and detention* alleged to have been done *mala fide* (paras (3)–(12));

(b) Freedom to practice Islam under Art 11 of the Federal Constitution (paras (13)–(19)), except for Abdul Razak bin Baharuddin, the first Applicant vide Encl (3), and Nordin bin Ahmad, the fifth Applicant vide Encl (7), where this is contained in paras (13)–(20) of their respective affidavits;

(c) The *Defect in the 'Detention Order ('D/O') itself and the 'Allegation of Facts' ('A/F')* as required under s 11(2)(b) of the Internal Security Act 1960 ('the ISA') as found in paras (21)–(23) of the first and fifth Applicants' affidavits, and in paras (20)–(22) of the rest of the Applicants affidavits; and

(d) The rest of the paragraphs of the eight affidavits contained *reasons* as to 'why' their applications should be allowed.

[4] In respect of (b) above, the basis of those relevant paragraphs can be summarised into two essential points. Firstly, it was the contention of all the eight Applicants that, based on the leader of the biggest Islamic Association in Indonesia, 'Nadhlatul Ulama', there is no establishment known as 'Jemaah Islamiah' as contended by the Respondent. Secondly, *all* the eight Applicants averred that, *all* the 'allegations of facts' as stated by Che Murad Sayang bin Ramjan, Penolong Setiausaha, Kementerian Dalam Negeri (Exh (2) to Encl (3) and its equivalent exhibits to all the other seven affidavits) were not true. Thirdly, in respect of the first and fifth Applicants,

their respective affidavits contained an additional para (20) which, notwithstanding their respective aforesaid averments, also stated that, they were active members of 'Pertubuhan Al-Ehsan' which was lawfully registered under the Akta Pertubuhan 1966 on 15 March 1999.

[5] In respect of the 'Defect' of the Detention Orders themselves, all the Applicants essentially categorically stated that, the 'allegation' of facts under s 11(2)(b) of the ISA should be made by the second Respondent and not by the aforesaid Che Murad Sayang bin Ramjan. As such, with regard to (5) above, they all challenged (1) the validity and the legality of the respective Detention Orders, and (2) that the Respondents should be charged in a Court of law, if what was alleged against them could satisfy the intention of the detention under the ISA. For (2), all the Applicants premised their challenge on the findings of the Indonesian Court in respect of the prosecution against Abu Bakar Bashir, the alleged leader of 'Jemaah Islamiah'.

[6] Since *all* the applications, except the first and the fifth Applicants who have an additional ground for their respective applications as pointed out above, are identical, Counsel for all the Applicants informed the Court through Encik Edmund that, he will heavily rely on Encl (3) with special reference to the relevant paragraph(s) of Encl (7) where necessary to support his submission for all eight Applicants. It will also be most appropriate for me at this juncture to point out that, at the very onset of Encik Edmund's submission, he *agreed* with the Court that since prayers (1) and (4) of Encl (2) have a flavour of purely an administrative act, as such, prayer (1) and the second part of prayer (4) should be struck off; and this is so ordered. He also *agreed* with the Court that prayers (6) of the same are to be abandoned, and both parties agreed that prayer (5) should stay. On that basis, Encik Edmund indicated to the Court (and this was agreed by the Respondents' Counsel) that, he will submit in respect of prayer (2) first, followed by a combined submission of prayer (3) and the first part of prayer (4) of Encl (2).

[7] In respect of the first submission, Encik Edmund submitted that, by virtue of the employment of the words '... action has been taken or threatened by any substantial body of person, ...', *any* detention by any police officers of any person under s 73 of the ISA or the issuance of a D/O under s 8 of the same Act *for* any of the reasons specified in clauses (a)–(f) of Art 149(1) of the Federal Constitution ('the FC'), *must* therefore be in harmony with the intention prescribed by the identical words of the preamble of the ISA. The said identical words are:

> WHEREAS action has been taken and further action is threatened by a substantial body of person both inside and outside Malaysia -
>
> (1) ...
>
> (2) to procure the alteration, otherwise then by lawful means, of the lawful Government of Malaysia by law established;
>
> AND WHEREAS the action taken and threatened is prejudicial to the security of Malaysia;
>
> ……..

[8] After examination of both Art 149(1) of the FC and the Preamble of the ISA ('the Preamble'), it is observed that:

(1) Art 159(1) used the word 'or' *after* the words 'action has been taken', whereas 'and' is the word used in the Preamble;

(2) '*Whether* inside or outside *the Federation'* are words found in Art 149(1), whereas the Preamble uses the words 'both inside and outside Malaysia':

(3) The *legislative intention* found in clauses (1) and (2) of the Preamble is certainly *identical in form and effect* as in clauses (a)–(d) respectively in Art 149(1); and

(4) Both clauses (1) of the Preamble and (a) of Art 149(1) speak of any action has been taken *'by a substantial body of persons'* whether 'inside or outside' Malaysia which must have the effect of causing or to organised violence against a substantial number of persons or their property.

[9] Having entertained the above observations, it was a strong contention of Encik Edmund that there *must* be factual evidence of 'threat' *and 'further action'* of threat by all the applicants *before* either any appropriate police officers or the Minister concerned can be said to be able to lawfully exercise their powers under s 73 or 8 of the ISA respectively. Failure to have such evidence means *any* arrest and detention under those sections must therefore be unlawful as being ultra vires Art 149(1). Thus, using the Applicant Abdul Razak bin Baharudin ('the Applicant') as an example for all the applicants before me, he submitted that there was no such evidence to justify the arrest and the detention of the Applicant. It was his contention that the issuance of the D/O, exhibited as 'Ex-2' to the Applicant's affidavit ('Encl (3)') was a mere act of rubber-stamping a mechanical act of the police officers acting under s 73 of the ISA. There was no application of the mind by the said Minister as there was no allegation of facts as to 'what' action of the Applicant 'is to be prevented'. To substantiate his contention he relied heavily on the cases of (1) *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MLJ 449, and (2*) Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1989] 1 MLJ 368.

With respect, I could not agree with Encik Edmund's submission as to the requirement that *'factual evidence of further action of threat' must* be present *before* any exercise of any legislative powers conferred to the appropriate authorities by either ss 73 or 8 of the ISA. The very usage of the words *'further action of threat' must* obviously *refer* to *'the future action'* of threat envisaged by both the Preamble and Art 149. That 'future action(s)' of threat is the very core intention of what the ISA was enacted to prevent; hence the common jargon of *'preventive detention'* which is frequently used to describe any detention under the ISA. Having said that, I am thus duty-bound to examine both the aforesaid cases of *Ezam* and *Jamaluddin* (supra).

[10] In *Jamaluddin's case* (supra), it was clear at p 369, when His Lordship Annuar J (as he then was) said in his conclusion that:

... the Minister has no power to deprive a person of his right to profess his religion which is guaranteed under art 11 of the Constitution ... [and to do so,] ... will be inconsistent with the provision of art 11 [making any] order of detention [as the aforesaid Ex-2 to be] outside the purview of the [ISA] and therefore not valid.

[11] He was relying on the 'Alasan-alasan untuk perintah tahanan' referred to at paragraphs (E). His Lordship's said conclusion was agreed with by the Supreme Court vide *Crime Appeal No 86 of 1988* on 22 February 1989. The said 'Alasan-alasan untuk perintah tahanan' states as follows:

Bahawa Kamu, Jamaluddin Bin Othman alias Yeshua Jamaluddin, sejak tahun 1985 hingga ditangkap pada 27 Oktober, 1987, telah melibatkan satu rancangan untuk menyebarkan agama Kristian di kalangan orang-orang Melayu. Kegiatan kamu itu boleh mendorong kepada timbulnya suasana ketegangan dan permusuhan di antara masyarakat Islam dengan masyarakat Kristian di Negara ini dan boleh memudharatkan keselamatan Negara.

which he held to be outside the purview of Art 149 of the FC by virtue of Art 11 of the same.

[12] Art 11 of FC provides:

11 (1) Every person has the right to profess and practice his religion and, subject to clause (4), to propagate it.

(2)

(3)

(4) State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

[13] Under Art 149(1) of the FC, it enabled the ISA to be enacted, notwithstanding that it is inconsistent with the provisions of Art 5 ('Liberty of the Person'), 9 ('Prohibition of banishment and Freedom of movement'), 10 ('Freedom of speech, assembly and association') or 13 ('Rights to property'). It makes no reference to Art 11 which specifically deals with 'Freedom of Religion'. As such, after my thorough analysis of all the relevant facts, including the grounds and allegations of facts (which I will discuss in substantial detail later), for making Ex-2 in the application before me, does not persuade me in any way to conclude that the printed activities of the Applicant can justifiably be said to fall within the intended constitutional provision of 'Freedom of Religion' entrenched in Art 11 of the FC. That being so, it is therefore my conclusion that *Jamaluddin's* case (supra) is not applicable to the present application before me, leaving me next to consider the said *Ezam's* case (supra).

[14] In the said *Ezam's* case, the main thrust of the Federal Court's decision pivoted on the arrest and detention under s 73(1) of the ISA. In that context, the Court dealt in detail with the question of 'whether or not s 73(1) is inextricably connected with s 8 of the ISA.' It was unanimously decided that it was not. The Court concluded that, in considering the said s 73(1), an *objective test* must be applied. As such, the Court is in the

position to enquire as to '*the reasons for the belief*' of the relevant officers as to *why* arrest and detention under the said section is necessary in accordance with the satisfaction of the legislative intention prescribed by sub-sections (a) and (b) of s 73(1) of the ISA. It was also decided by the Federal Court that, unlike the said s 73(1), a *subjective test* must be applied when considering the Minister's issuance of a D/O under s 8(1) of the ISA. On that basis, the said *Ezam's* case was decided by the Federal Court on the issue of 'police investigation and interrogations' during the s 73(1) of the ISA detention and *not* the Minister's decision under s 8(1) of the same Act To that extent, *Ezam's* case *does not* apply to the present case before me where the consideration is the latter. The consideration before me is that there must be ground(s) to satisfy the Court that:

(1) The 'arrest and detention' (s 73(1)(a) of the ISA.) of the Applicant would justify detention under s 8.

(2) The Applicant 'has acted' or *'is likely to act'* in *any* manner prejudicial to the security of Malaysia or any part thereof.

[15] To answer that, I am compelled to revert to the said *Ezam's* case to guide me to crystallise answers for the two aforesaid questions above.

[16] In *Ezam's* case, it was clearly shown by the Federal Court that the Appellant who was arrested and detained under s 73(1) of the ISA was *not* given the opportunity of his constitutional right to his legal counsel. For that, the Court analysed in great depth various relevant affidavits of the respondents in material particulars. Upon such analysis, it was held that the arrest and detention was made *mala fide* for a 'collateral' or 'ulterior' purpose other than *what* the Legislature had in view in enacting the ISA. Siti Norma FCJ held at p 454 para (C)–(D) that:

(13) …

> The ISA makes *no* provision for denial of access *to* legal representation which would be inconsistent with Art 5(3). As such, the ISA is still subject to the rights entrenched in art. 5 (3) *and* art 149 *cannot* be used to remove such rights ...

(Emphasis added).

[17] Abdul Malik Ahmad FCJ at p 453 recognised the same as follows:

(10) …

> .... since all the appellants had been denied access to legal representation throughout thewhole period of detention, this was a proper case to hold the detention of the appellants to be unlawful ...

because Art 149 of the FC cannot take away such a right provided by Art 5(3) of the same.

[18] The question of *mala fide* issuance of a detention order was discussed in the case of *Yap Hock Seng @ Ah Seng v Minister for Home Affairs, Malaysia & Ors* [1975] 2 MLJ 279. At p 284, para (C) of that case, Abdoolcader J (as he then was) held as follows:

Mere circumvention of the ordinary process of law cannot by itself amount to *mala fide* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide detention for specified purposes.

[19] At paragraph (1), he further said:

But where an order of detention is challenged on the ground of mala fide, what has got to be made out is *not* the want of *bona fide* on the part of the police, *but* the want of bona fide as *well as the non-application of the mind* on the part of the detaining authority which for this purpose must be taken to be *from the police*.

(Emphasis added).

[20] In that context, armed with *Ezam's* case which provides authoritative guidelines of what to look for in relation to the 'legislative intention' of any s 73(1) detention, I would humbly adopt *Basu's Commentary on the Constitution of India* (15th Edn) Vol 2 p 153. which states as follows:

The question of *mala fides* has to be decided with reference to the facts of each case and the observations in one case, cannot be regarded as a precedent in dealing with other cases.

(Emphasis added).

[21] It follows therefore that, the facts and observations in *Ezam's* case *'cannot* be regarded as a precedent' applicable in all aspects of the facts of the present applications before me. Detention under s 8(1) of the ISA was not the main issue in *Ezam's* case as evidenced by what Steve Shim CJ (Sabah and Sarawak) said at p 481 as follows:

... I find it appropriate ... [to hold] that the detentions of appellants by the police under Section 73(1) of the ISA are ... unlawful. However, as the undisputed facts show that the appellants, ie, first, third, fourth and fifth appellants have now been detained by order of the Minister under section *8 of the ISA,* the *issue* of whether or not to grant the writ of Habeas Corpus for their release from current detention does not concern us. That *is a matter of different exercise.*

(Emphasis added).

which, in my case, is precisely on the issue of the detention under the said s 8(1). It has nothing to do with the 'reason to belief spoken of by the Federal Court in *Ezam's* case, *but* it will certainly *help to negate any proposition that the Minister did not apply his* mind before he issued Ex-2.

[22] Even though the discretion of the Minister under s 8(1) of the ISA is wide, he still has to comply with the procedural requirements of the law in issuing Ex-2. Failure to do so, will attract a declaration that Ex-2 is unlawful which compels a writ of Habeas Corpus to be issued by virtue of s 8B of the ISA. The said section provides:

(1) There shall be no judicial review [as defined by section 8C of the ISA] in any Court of, and no Court shall have or exercise any jurisdiction in respect of, any act done or decision made by ... the Minister in the exercise of their discretionary power in accordance with this Act, *save in* regard to any question on *compliance with any procedural requirement in this Act* governing such act or decision.

(Emphasis added).

[23] One such requirement is the 'application of the mind' by the Minister that Ex-2 was made '... with a view to prevent [the Applicant] from acting in any manner prejudicial to the security of Malaysia or any part thereof ...'. That being so, I will now endeavour to examine Ex-2.

[24] Ex-2, for convenience, inter alia, states:

> BAHAWASANYA saya [Menteri Dalam Negeri, Malaysia] berpuashati yang Perintah Tahanan adalah perlu dibuat ke atas orang yang namanya tersebut di bawah ini [iaitu Abdul Razak bin Baharudin] dengan hendak menceaah beliau daripada melakukan perbuatan dengan apa-apa cara yang memudharatkan:
>
> (a) Keselamatan Malaysia
>
> ...
>
> (Emphasis added).

[25] The emphasised above satisfies me that Ex-2 was made by the Minister by applying his mind to the need for *preventing* Abdul Razak bin Baharuddin from 'acting in any manner prejudicial to the security of Malaysia or any part thereof'. In that respect, there was therefore no procedural defect in Ex-2.

[26] Ex-2 was dated 21 February 2002. By virtue of s 11(1) of the ISA, a copy of Ex-2 must be served on the Applicant *'as soon as may be after the making thereof'*. Failure to do so, will attract the issuance of the writ of Habeas Corpus for non-compliance with a procedural requirement under s 8B(1) of the ISA. The purpose of such service *must* be to enable the Applicant to make representation against Ex-2 to the Advisory Board constituted under Art 151(2) of the FC. The Application must also be furnished, in writing:

(1) of the grounds on which Ex-2 was made (s 11(2)(b)(i) ibid); and

(2) of allegations of fact on which Ex-2 was based (s 11(2)(b)(ii) ibid)

[27] Upon perusal of Ex-2 p 2, it is without doubt that a copy of it *was* served *and* acknowledged as being so served by the Applicant on 22 February 2002 at 2.40 pm. It was served on him by Chief Inspector Ahmad Taufik b Hj Kutik (Encl (21) para (4), on ('22 February 2002 at 2.40 pm') satisfying the requirement of 'as soon as may be *after* the making [of the Ex-2]' within the purview of s 11(1) of the ISA. Likewise, I am fully satisfied, on the facts, that the requirements of both ss 11(2)(b)(i) and (ii) of the same Act were equally complied with as evidenced by 'ATK-2' to Encl (21).

[28] From the above, it is clear to me that, even though the Minister concerned, on the authority of *Ezam's* case (supra), is *not* required to consider the legislative intention of 'arrest and detention' under s 73(1) of the ISA in considering the issue of his 'application of his mind', it would appear to me that he did consider the aforesaid intention. As such, (1) 'Alasan-alasan untuk Perintah Tahanan' and (2) 'Pemvataan Fakta untuk Perintah Tahanan' need to be examined to see whether or not Ex-2 was lawfully justified to be issued within the context of s 8(1) of the ISA.

[29] From (1) above, the *grounds* that must have been *considered* by the Minister concerned were, inter alia; **A**

(i) The Applicant was a member of 'Jemaah Islamiah ('JI');

(ii) As a member, he was involved with its activities from the end of 1998 until 29 December 2001; **B**

(iii) JI was, and is, to be the platform for the spirit of 'Jihad' and 'mati syahid' through gatherings of 'tamrin, usrah dan tazkirah' by several Indonesian 'pendakwah' loyal to the leader of the JI;

(iv) For that purpose, those 'pendakwah' had attended several secret military trainings, both physical and theoretical; and **C**

(v) The purpose of those trainings, *and* thus (iii) above, formed their basis of launching 'holy war' (ie 'perang jihad') *unconstitutionally in* order to form an Islamic Nation of Nusantara which includes Malaysia, by the use of force and arms against the Government of the day of Malaysia.

[30] All those facts, in my considered view, are *not* just fantasies *but* specific in nature. Those facts must have been *objectively* considered by the Minister which must have compelled him to *conclude subjectively* that, they were 'prejudicial to the security of Malaysia or any part thereof.' It was those 'prejudicial' acts which the Minister sought 'to prevent'; *and* hence the issuance of Ex-2. **D** **E**

[31] Analysis of (2) above, satisfies me that, the allegation of 'prejudicial' activities were clear and specific. The period of the Applicant's involvement in such activities was identified with a certain amount of certainly; that is between the period of the end of 1998 until his arrest on the 29 December 2002.

[32] Both the aforesaid grounds, and the allegation of facts considered by the Minister, were prepared by Che Murah Sayang bin Ramjan, Penolong Setiausaha, Kementerian Dalam Negeri. He did it on the instruction of the Minister as evidenced by paragraph (4) of his affidavit (Encl (43)) and confirmed by para (6) of the Minister's affidavit (Encl (46)). The said instruction by the Minister is within the purview of the Minister's powers and is provided for by s 6 of the Delegation of Powers Act 1956. and *not* disputed by the Applicant's counsel. As such, it is my humble conclusion that the Minister *did* apply his mind as required of him by law. Besides that report, he must have also considered the relevant facts *objectively* made available to him during the detention period under s 73(1) which he was not obliged to do so by the authority of the aforesaid *Ezam's* case. This can be extracted by reference to a number of paragraphs of his affidavit. **F** **G** **H**

[33] In para (8) of the Minister's affidavit, he referred to paras (6), (10)–(20) of the Applicant's affidavits (Encl (3)). In para (6), there can be no dispute that Ex-2 is the detention order against the Applicant. Paras (10)–(12) of Encl (3) referred to Ex-2, which, according to the Applicant was based on the allegations of fact that he was a member of 'JI' which is different entirely from 'KMN'. That too was considered by the Minister before Ex-2 was issued, in the following words: **I**

A ... *sebelum* saya mengeluarkan [Ex-2], *saya telah meneliti sepenuhnva setiap laporan berkenaan dengan kegiatan [the Applicant] dan sesungguhnva telah berpuashati* bahawa *[Ex-2] adalah perlu dibuat ke atas [the Applicant]*.

(Emphasis added).

[34] 'Laporan' referred to above must therefore be taken, on the facts of
B this application, to include .what was deposed by Tan Sri Norian Mai in his affidavit (Encl (41)).

[35] In para (6) of Encl (41), he admitted making the press statement on 4 January 2002 that the Applicant was one of the members of 'KMN', but corrected himself by satisfactorily explaining that it was not 'KMN' *but* a
C member of 'JI'. In that respect, if the Minister *did not* apply his mind *to all* relevant facts, Ex-2 should in natural consequence be based on the Applicant's involvement as a member of 'KMN' and not 'JI'. Thus by stating that the Applicant was one of the members of JI, this suggests to me, without doubt, that the Minister *not* only applied his mind before issuing Ex-2, *but* based his decision on the correct fact; that is, 'as a member of JI
D and not 'KMN'.

[36] Paras (13)–(20) of Encl (3), speak of freedom contemplated by Art 11 of the FC. I have pointed out earlier that the facts of this application are *not* of the 'freedom of religion' as of fact, *but of* activities which the Minister rightly concluded were 'prejudicial to the security' of the country
E and *must* be 'prevented'. Thus, in para (9) of his affidavit, he completely denied the averment of the presence of mala fide (para (12), Encl (3); I agree. He must have *objectively* evaluated all relevant facts which satisfies the legislative intention of s 73(1) of the ISA of 'arrest and detention' by. appropriate police officers. I am also satisfied that the Minister *did* give careful consideration *and* evaluation of the material particulars contained in
F the Deputy Superintendent of Police, Yusoff b Mohd Amin's affidavit (Encl (20)), as evidenced in paras (4) and (5) of Encl (46).

[37] In para (5) of Encl (20), DSP Yusof *did* examine the report of the arrest of the Applicant. Viewed *objectively* (*Ezam's* case (supra)), he must have been satisfied that it was necessary for the applicant to be detained
G further for a period of 30 days, otherwise he would *not* have reported the matter *7 hours later* (ie, 5.15 pm, 25 January 2002) to the Minister as required by s 73(3)(c) of the ISA, exhibited by 'YMH-2'. In para (2) of 'YMH-2', the 'details of arrest and detention' were attached for the Minister's consideration which was marked as 'Lampiran A' thereto. He explained, in his para (7) that 'Lampiran A' was not exhibited as it was
H classified as 'Rahsia', and its exposure would be against the interests of Malaysia. The same explanation was also given by acting Supt Amir Hamzah b Ibrahim in his affidavit (Encl (19)) in respect of 'Lampiran A'. Why the Applicant was arrested was explained clearly by ASP Azhar b Mohd Yusof (Encl (16)).

I **[38]** Encl (16) exhibits, inter alia, 'AMY-2', 'AMY-6' and 'AMY-8', which demonstrate, *viewed objectively*, what was seized by Azhar, what was in the Applicant's possession and control that justified him to arrest and

detain the Applicant under s 73(1) of the ISA, and his subsequent detention under s 73(3)(a)–(c) of the same Act.

[39] At p 3 of 'AMY-2', material seized, amongst other things, was:

(1) (f) Bahan cetakan ...

(i) Tokoh Mujahidin Afghan …

(ii) …

(iii) Dengan Menyamar Mujahidin ...

(iv) ...

(v) ...

(vi) News from the Jihad in Afghanistan, December 2001:

(g) Satu VCD-GUNS

(h) Hadits-Hadits JIHAD …

[40] From 'AMY-6', what was seized by ASP Azhar was:

(a) 4 naskah buku bertajuk Jihad Jalan Tunggal Menuju Khilafah.
(b) 1 naskah buku bertajuk Gerakan Islam.
(c) Sistem Republik Islam (1 naskah).
(d) Proses Republik Islam (1 naskah).
(e) …

[41] In 'AMY-8', inter alia, the seized materials were:

4. Nota Al Jihad Fi-Sabilillah ...
5. Nota Al Jihad Fi-Sabilillah ...
16. 1 buku tajuk 'Jihad (Perang Suci Islam)'
17. 1 kaset bertajuk 'Jihad' ...
21. 1 buku mengenai MILF ...
25. 1 buku tajuk 'Tarbiyah Jihadiah 1'
26. 1 buku tajuk 'Tarbiyah Jihadiah 4'
27. 1 buku tajuk 'Tarbiyah Jihadiah 6'
30. 1 buku tajuk 'Tarbiyah Jihadiah 7'.

[42] All those quoted above, fit the words 'Jihad', 'Mati syahid' and 'tazkirah' found in 'AA-4 to Encl (46)', which, if applying the test objectiveiy, will satify the requirements of s 73(3)(a)–(c) of the ISA.

[43] On the premises above, such references by the Minister compel me to conclude that, in issuing Ex-2, he *did not* just *mechanically* issue it *without*

considering relevant facts and material particulars pertaining to the security of Malaysia or any part thereof. The purpose of such issuance is curtailing 'for the purpose of preventing the Applicant from [continuing] acting in any manner prejudicial to the security of Malaysia or any part thereof' in line with the spirit of s 8(1) of the ISA. There was no breach of procedural requirements by the Minister in issuing Ex-2. That being my conclusion, I therefore deny the Applicant his application for a writ of Habeas Corpus; and also to the other seven Applicants as per the Encl (2) application.

Application dismissed.

Reported by AG Kalidas